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No. 87-2011

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1987

WASHINGTON STATE ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Washington corporation, et al.,

Petitioners,

v.

FRANK FORREST, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether authorized rule-making activity by the Washington State Apprenticeship Training Council, taken pursuant to a clearly articulated state policy to displace competition with a regulatory scheme, is exempt from federal antitrust laws.

2. Whether state laws which displace competition and establish a specific, detailed and comprehensive regulatory scheme for apprenticeship training constitute a clear articulation of state policy sufficient under *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny to protect from antitrust scrutiny the activities of state officials consistent with such regulatory scheme.

3. Whether persons who are appointed by state officials pursuant to specific legislative authority in order to engage in state regulatory and rule-making activity constitute state officials or agents for purposes of *Parker v. Brown* immunity from federal antitrust law.

4. Whether the regulatory and rule-making activities of the WSATC are actively supervised by the state.

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STATEMENT

This action was brought by a group of non-union contractors and contractor associations (hereinafter "Contractors") to undercut important Washington State policy in favor of effective regulation of apprentice training. Although disguised as an antitrust treble-damages action, the Contractors' lawsuit in reality is an effort to obtain judicial repeal of regulatory protections which currently are afforded to apprentices in training programs which have received state approval.

The Contractors have sued six individuals who at different times have served as appointed members of the statutorily created Washington State Apprenticeship Training Council. They also have sued the State itself and the state Department of Labor and Industries, which is, pursuant to statute, the parent body for the Council.

Since 1941, the State of Washington has extensively regulated apprentice training in an effort to promote training in the skilled trades such as carpentry, plumbing and the electrical trade. Before state regulation of apprentice training, young people seeking training and experience in skilled trades were exploited as a source of cheap labor, often at inadequate wages and without any meaningful training or opportunities for advancement. The state regulatory program is designed to establish and maintain standards of apprentice training programs so that the programs are an attractive and rewarding opportunity for young people in the labor force. *See* Wash. Rev. Code § 49.04.050 (Pet. App. 4, at 51a-54a). The state legislature specifically has designated apprentice wages as an appropriate area for regulation. Wash. Rev. Code § 49.04.050 (5) (Pet. App. 4, at 52a).

State approval and regulation of apprenticeship programs is voluntary; no state law or regulation precludes the Contractors from establishing such programs without state approval. State approval amounts to a form of accreditation for programs meeting or exceeding the minimum standards established by the state.

State approval also confers an important benefit on those whose training programs meet or exceed regulatory standards. For the State of Washington has a "little Davis Bacon Act" which provides that, on state and local public works projects, skilled labor must be paid the prevailing journeyman wage. *See* ch. 39.12 Wash. Rev. Code, especially §§ 39.12.020 and 39.12.021. Apprentices in approved training programs, however, may be paid less than prevailing journeyman rates, but must be paid at least the prevailing hourly rate for apprentices in that trade. Wash. Rev. Code § 39.12.021.[1] Thus, contractors who employ ap-

prentices from approved training programs can pay such apprentices prevailing apprentice wages rather than the more costly journeyman wage.

The rule challenged by the Contractors, Wash. Admin. Code 296-04-270(2)(c), was adopted by the Council in order to protect against economic exploitation of apprentices on work which was not covered by the state "little Davis Bacon Act." The part of the rule about which the Contractors complain requires any new programs in an area and craft already served by an apprenticeship program to pay a wage scale identical to or greater than that of the existing program.[2]

Because in most instances existing programs are union-sponsored, the wages for such programs and consequently the apprentice wages invoked by the rule for each trade or craft often are determined by the collective bargaining process for journeyman wages. The Council and its members do not control or influence such wage negotiations. The journeyman wages which form the basis for apprentice wage scales in existing programs and, pursuant to the rule, for wage scales in any new programs for the same trades and crafts, are thus determined by free market

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[1]This provision reads as follows:

Apprentice workmen employed upon public works projects for whom an apprenticeship agreement has been registered and approved with the state apprenticeship council pursuant to chapter 49.04 RCW, must be paid at least the prevailing hourly rate for an apprentice of that trade. Any workman for whom an apprenticeship agreement has not been registered and approved by the state apprenticeship council shall be considered to be a fully qualified journeyman, and, therefore, shall be paid at the prevailing hourly rate for journeymen.

[2]General statewide uniformity among the various apprentice training programs for each skill and craft is an important regulatory policy. Accordingly any new programs must adopt standards for training which are "substantially similar" to previously-approved programs. Wash. Admin. Code 296-04-270(2)(b) (Pet. App. 5, at 58a) General uniformity of training standards and wage scales promotes the attractiveness of approved programs to apprentices, who may be called upon to relocate frequently during their apprenticeship. The regulatory standards give assurances that the same opportunities for training and economic rewards are available statewide.

forces in the market for skilled labor, as those forces operate in the collective bargaining process.

Historically, such journeymen wages have been negotiated at levels which provide a basis for an adequate progressive scale of wages for apprentices. The effect of the rule is to take this competitively-determined wage and use it as a basis for establishing minimum apprentice wages for projects not covered by Washington's "little Davis Bacon Act."

What the Contractors seek through this action is the ability to obtain state approval for an apprenticeship program that will qualify them to pay apprentices on public works less than prevailing journeyman wages, while retaining the ability to pay substandard wages to apprentices on private works. To avoid this inequity and degradation of apprentice training, the challenged rule requires contractors who enjoy the benefits of state approval when they employ apprentices on public works to meet wage-protection requirements for apprentices on private works.

The Contractors are, as previously noted, legally free to disregard these wage-protection requirements for apprentices on private works. And even if they disregard these requirements, they still are legally free to compete for state and local public works. But they incur a cost disadvantage in competing for public works, *i.e.*, the requirement that they pay journeyman wages to their apprentices.

The State, in short, is merely using its control over public works to provide an incentive for those who would do business with it (and with local governments) to avoid substandard wages for apprentices on private works as well. While the State, through this method, is displacing competition with a regulatory scheme, that displacement is certainly modest and minimal.

Ruling on cross-motions for summary judgment, the district court held that adoption of the challenged rule was exempt from federal antitrust law under the *Parker v. Brown* doctrine. The court specifically ruled that the Council acted pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with

regulation in the area of apprenticeship and apprentice wages. (Pet. App. 2, at 39a-42a). The district court further ruled that because the actor in this case was a state agency, active supervision was not required.

The Ninth Circuit affirmed, holding that the wage-protection rule is a "foreseeable result" of the Council's legislatively delegated responsibilities and that the Council's activities were monitored and supervised by the state. The court declined to decide whether the Council was a state agency for purposes of *Parker v. Brown* analysis. The Contractors' petition for rehearing was denied and they now seek a writ of certiorari from this Court.

ARGUMENT

A. The Council And Its Members Are State Officials Whose Activities Have Promoted State Policy.

It has long been held that the federal antitrust laws were not intended to apply to the state nor to restrain state officers or agents from activities directed by a legislature, even though such activities would restrict or otherwise regulate competition. *Parker v. Brown*, 317 U.S. 341 (1943).

Petitioner merit shop contractors attempt to circumvent this fundamental principle by asserting that the Council acted not as state officials, but as a group of private individuals guided by private interests in conflict with the public interest. The district court expressly rejected this assertion and the Ninth Circuit declined to characterize the respondent Council members as private actors. The district court ruled that this action challenged the activities of a state agency, not private parties. (Pet. App. 2 at paragraphs 3 and 14).

The Washington State legislature has clearly established the Council as a state agency with delegated legislative authority in the area of apprenticeship regulations. In the statute which creates and empowers the Council to act,

the legislature grants to the Council regulatory authority to establish standards for apprenticeship agreements and to issue "such rules and regulations as may be necessary to carry out the intent and purposes" of the Apprenticeship Act. Wash. Rev. Code 49.04.010 (Pet. App. 4, at 47a). The council also is obligated to submit a public annual report to the Director of Labor and Industries about its activities and findings. (*Id.* at 49a).

In the same statutory provision the legislature directs that 7 representatives be appointed: 3 representatives of employee organizations, 3 representatives of employer organizations and 1 public member. Historically, representatives of trade unions have been appointed to the positions reserved for employee organization representatives because trade unions clearly qualify as employee organizations within the meaning of the statutory provision.

Thus, the legislature has established a Council with balanced interests and specific expertise to implement state regulatory policy for apprentices, with accountability to the public and the Director of Labor and Industries. By virtue of this enabling legislation and the accountability requirements thereunder, the Council is a state agency and its members unmistakably are acting as state officials for purposes of *Parker v. Brown* analysis.

Application of an active supervision requirement is crucial to the success of the contractors' argument. However, not only has this argument failed in the two lower courts, but also it flies in the face of the most recent pronouncements from this Court on the issue. In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, at 46 (1985), this Court held that the active supervision requirement should not be imposed in cases in which the actor is a municipality. The Court reasoned that little danger exists in such cases that the municipality would be involved in private price-fixing arrangements. In a logical extension of this reasoning, the Court suggested the appropriate rule in this case, stating that "in cases in which the actor is a state agency, it is likely that active state supervision would also not be required . . ." *Town of Hallie*, 471 U.S. at 46, n.10.

B. The Activities At Issue Here Present No Danger Of Anticompetitive Abuse And Do Not Require Additional Supervision.

The reasoning in *Town of Hallie* that supervision of municipalities was not required depended in part on the observation, equally applicable here, that the public exposure of municipalities provides greater protection against antitrust abuses than exists for private actors. *Town of Hallie*, 471 U.S. at 45.

The Council's conduct at issue here was the public adoption of the so-called wage-parity rule at a public meeting. After extensive discovery in this action, the Contractors were unable to persuade the district court that the Council members had acted in any manner inconsistent with their status as state officials, advancing state regulatory policy. (Pet. App. 2 at paragraph 14).

As in *Town of Hallie*, there is little danger that a public rule-making body, such as the Council and its members, would be engaged in a private price-fixing arrangement. The Contractors offer no basis for overturning the rulings of the lower courts that the Council acted lawfully in the context of a comprehensive regulatory scheme and in a manner consistent with express state regulatory policy. Instead, the Contractors make a false comparison between the rulemaking activity here and the private conduct challenged in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980); *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987).

When the Contractors' price-fixing rhetoric is penetrated, however, it is clear that the rule-making activities under challenge here differ significantly from the activities challenged in those actions. In each of those cases the activities for which state action immunity was claimed presented clear dangers of anticompetitive abuse. *Midcal Aluminum* (resale price maintenance by producers and distributors); *Southern Motor Carriers* (horizontal rate fixing by motor common carriers); and *324 Liquor Corp.* (resale price maintenance by liquor distributors). In this

case the challenged conduct, *i.e.* Council adoption of the wage parity rule, presents no such dangers. Contrary to the Contractors' conclusory allegations, the rules do not enforce a private price-fixing arrangement.

Unlike *Midcal*, *Southern Motor Carriers* and *324 Liquors*, where the state enforced private price-fixing arrangements, in this case no private parties control the journeyman wages which form the basis for the "progressively increasing scale of wages" for apprentices.

A brief explanation will clarify this important point. The wage-parity rule establishes a four-part standard for apprentice wages. The rule requires entry level wages for apprentices to be a percentage of the journeyman scale set by the applicable collective bargaining agreement or the Davis-Bacon Act wage where no collective bargaining wage is in effect. For a new apprenticeship program in an area and trade already served by an existing program the new program's wage scale must match or exceed the existing program's scale. Lastly, if there is no applicable collective bargaining agreement, no applicable Davis-Bacon Act wage and no existing apprenticeship program, then the statistician at the state Department of Labor and Industries sets the prevailing wage. Wash. Admin. Code § 296-04-270(2)(c) (Pet. App. 5, at 58a-59a).

Most apprentice training programs in Washington were established years ago by trade unions in the collective bargaining context. Consequently, the controlling wage scale for most new programs is that used in the existing programs, *i.e.* the collective bargaining journeyman scale.

This process for establishing minimum wages for apprentices presents none of the dangers of anticompetitive abuses that were present in *Midcal*, *Southern Motor Carriers* and *324 Liquors*. The collective bargaining journeyman wages are not controlled by private parties, nor can they be manipulated in an anticompetitive manner. Such wages are set by a process of adversarial, arms-length bargaining between labor and management in a highly competitive environment. No labor unions control such wages and no members of the Council can influence such wages.

The private conduct challenged in *Patrick v. Burget*, ___ U.S. ___, 108 S. Ct. 1658 (1988) is likewise not comparable to the rulemaking activity here. In *Patrick*, the actors were private physicians acting as a peer review group for a private hospital. They were not state officials acting under governmental authority, there was no delegation of legislative authority, and the actors had no rule making power or public accountability. In short, the rule of *Patrick*, concerning supervision of private actors is inapplicable here.[3]

The Contractors' real complaint is not that they are injured by the anticompetitive activities of private parties, but rather that apprentice training regulation denies them the opportunity to reduce and suppress apprentice wages. Price-fixing rhetoric aside, it is clear that the Contractors simply object to the state's policy of regulating apprentice wages. Instead of challenging that policy in the legislature, the Contractors have pursued this ill-fated antitrust action. After dismissal in the district court and affirmance on appeal, this action now is reduced solely to an attack based on the status of 3 members of the 6 member Council which adopted the wage-parity rule.

C. **The Council's Challenged Activities Are Consistent With Clearly Articulated And Affirmatively Expressed State Policy.**

In Wash. Rev. Code Chapter 49.04, the State of Washington has established an elaborate and comprehen-

[3]Even though imposition of an active supervision requirement is inappropriate here because the Council and its members are not private actors, such requirement is satisfied by the supervision inherent in the state's regulatory program, of which the Council is a part. The regulatory program is not administered by the Council, but by a state official, the Supervisor of Apprenticeship who acts with the advice and guidance of the Council. The supervisor is appointed by and responds directly to the Director of Labor and Industries. Wash. Rev. Code 49.04.030 (Pet. App. 4, at 49a-51a). The Supervisor and his staff directly monitor the activities of approved programs to ensure compliance with regulatory requirements. Further, the Supervisor has authority to reject any apprenticeship agreements and to recommend to the Council cancellation of any program. Wash. Admin. Code 296-04-270(3)(a) and (3)(d). (Pet. App. 5, at 59a-62a). The Council itself prepares a public annual report to the Director of Labor and Industries about its activities and findings. Wash. Rev. Code 49.04.010(*Id.* at 49a).

sive scheme for the regulation of apprenticeship in the State of Washington. While registration of apprenticeship programs is voluntary, Wash. Rev. Code § 49.04.070, those seeking the benefits of registration and approval must follow the regulatory scheme which focuses upon the establishment of program standards for the various crafts and trades. Among the many areas which the Legislature directed the Apprenticeship Council to regulate was "a statement of the progressively increasing scale of wages to be paid the apprentice." Wash. Rev. Code § 49.04.050(5). (Pet. App. 4, at 51a-52a). Accordingly, apprentice wages are specifically identified as a subject for regulatory standards.

Both the district court and the Ninth Circuit ruled unequivocally that the Council's adoption of the wage-parity rule is consistent with the state policy in favor of apprentice regulation, including regulation of wage scales. (Pet. App. 2 at paragraph 13 and App. 1 at 20a-21a, respectively).

Although the Contractors acknowledge the legislative reference to apprentice wages as an appropriate area for the development of regulatory standards, they contend that because the legislature failed to specifically articulate the concept of minimum wages, the Council's adoption of the wage-parity rule is unsupported by state policy.

This Court has never required such precise specificity for the legislative enactments which restrict competition. Wisely recognizing the practical realities of government through administrative agencies, this Court has emphasized that such detailed specificity is not needed to satisfy the "clear articulation" prong of the state action test. In *Southern Motor Carriers, supra*, this Court held:

> that if the State's intent to establish an anticompetitive regulatory program is clear, * * * the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws. 471 U.S. at 65.

Accordingly, the State's clearly expressed intent to displace competition with a comprehensive regulatory program for apprenticeship training plainly is sufficient to

protect from antitrust scrutiny the Council's acts consistent with that intent.

CONCLUSION

The decision below is in all respects consonant with this Court's decisions regarding application of the *Parker v. Brown* doctrine. The conduct challenged in this case is the rule-making activities of state officials, not private price-fixing arrangements. The state legislature has directly delegated rule-making authority to the Council pursuant to a clearly articulated state regulatory policy and has specifically directed the Council to establish standards for apprentice wage scales. The rule adopted by the Council is within the scope of the delegated legislative authority and consistent with the state's comprehensive regulatory scheme. The rule does not enforce a private price-fixing arrangement. Instead, the rule employs, for some new apprenticeship programs, a competitively-set collective bargaining wage as a minimum basis for apprentice wages.

Accordingly, the Ninth Circuit's reliance on the rule of *Town of Hallie* and *Southern Motor Carriers* is correct and provides no basis or need for a writ of certiorari. The petition should be denied.

Respectfully submitted,

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